

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

Policies and Rules Regarding)

Minority and Female Ownership of)

Mass Media Facilities)

MM Docket Nos. 94-149

and 91-140

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**COMMENTS IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING**

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys and pursuant to Section 1.415 and 1.419 of the Commission's Rules, hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("NPRM") in this proceeding.^{1/}

The Commission has commenced this proceeding "to further the core Commission goal of maximizing the diversity of points of view available to the public over the mass media, and to provide incentives for increased economic opportunity" through increased participation by minorities and women in the communications industry.^{2/} In the *NPRM*, the Commission proposes various specific mechanisms to provide minorities and women with greater opportunities to enter the mass media industry, "including ... wireless cable ...services."^{3/} WCAI is the primary trade association of the wireless cable industry. Its members include the operators of virtually every wireless cable system in the United States, manufacturers of transmission and reception equipment, program suppliers and licensees in the Multipoint

^{1/}*Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, FCC 94-323, MM Docket Nos. 94-149 and 91-140 (rel. Jan. 12, 1995) [hereafter cited as "*NPRM*"]

^{2/}*Id.*, at ¶ 1.

^{3/}*Id.*

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Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") that provide transmission services to wireless cable system operators. Thus, WCAI has a vital interest in the subject matter of the *NPRM*.

In the *NPRM*, the Commission has proposed several mechanisms for achieving its goals, including expanded use of tax certificates,^{4/} the development of an "incubator" program to promote new entry into the communications industry,^{5/} and the relaxation of the ownership attribution rules.^{6/} With regard to the wireless cable industry, the *NPRM* specifically requests comments as to how an "incubator" program could be applied to wireless cable^{7/} and whether tax certificates should be available to wireless cable operators.^{8/}

At the outset, WCAI should reiterate its long-standing support for the Commission's general goals of maximizing the diversity of viewpoints available to the public and providing incentives for increased economic opportunity to minorities and women.^{9/} Few wireless cable system operators are today controlled by minorities and women, a fact that can certainly be attributed, at least in part, to the documented difficulties minorities and women suffer in raising capital. Although it is well-recognized that a wireless cable system can be constructed at lower

^{4/}See *id.*, at ¶¶ 28-32.

^{5/}See *id.*, at ¶¶ 15-24.

^{6/}See *id.*, at ¶¶ 25-27.

^{7/}See *id.*, at ¶ 18.

^{8/}See *id.*, at ¶ 30.

^{9/}See, e.g., Comments of WCAI, MM Docket No. 94-131 and PP Docket No. 93-253, at 55-66 (filed Jan. 23, 1995) [hereinafter cited as "WCAI MDS Auction Comments"]; Comments of WCAI, MM Docket No. 92-261 (filed Feb. 16, 1993).

cost than a traditional coaxial cable system,^{10/} it nonetheless costs several million dollars to launch a successful wireless cable system. Not coincidentally, however, a substantial number of women and minorities are MDS licensees. This can be traced to the fact that the vast majority of MDS channels ever licensed were awarded through random selection proceedings in which significant minority and diversity preferences were awarded and in which financial entry requirements were minimal.^{11/}

WCAI has consistently supported the Commission's efforts to enhance participation by minorities and women in the wireless cable industry. For example, in comments filed in response to the *Notice of Proposed Rulemaking* in MM Docket No. 94-131, in which the Commission is considering the use of auctions to award MDS licenses (the "*MDS Auction Proceeding*"), WCAI advocated the use of tax certificates, installment payments and bidding credits to promote greater participation of businesses owned by women and minorities in the wireless cable industry.^{12/} As the WCAI noted in the *MDS Auction Proceeding*, the use of tax certificates would be particularly appropriate in conjunction with the use of competitive bidding to award licenses for new MDS stations as a mechanism to assist minority- and women-owned businesses in retaining their significant presence as MDS licensees.^{13/}

^{10/}*Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7484 (1994).

^{11/}See 47 C.F.R. §1.1622 (preferences in lotteries for award of MDS licenses where applicants are members of minority groups or own few media of mass communications).

^{12/}See *id.*

^{13/}See WCAI MDS Auction Comments, at 56.

In this proceeding, the Commission has solicited comment on whether it should grant tax certificates to minority wireless cable system operators.^{14/} Because it is the wireless cable system operator, and not the MDS licensee, that traditionally selects the content of the programming provided to subscribers, the use of tax certificates as a mechanism for promoting the acquisition of wireless cable systems by entities controlled by minorities or women can promote a diversity of viewpoints. The Commission has successfully employed tax certificates over the years to promote minority ownership of broadcast stations and cable television systems and to encourage owners of such stations and systems to sell their facilities to minority-owned businesses.^{15/}

As long ago as 1978, the Commission noted the significant under-representation of minority voices in the control and selection of audio and video programming for delivery to the home, and the need for adequate representation of minority viewpoints. The Commission stated at that time that:

Adequate representation of minority viewpoints in programming services not only the needs and interests of the minority community but also enriches and educates the non-minority audience.^{16/}

^{14/}See *NPRM*, at ¶ 30.

^{15/}See, e.g. *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982)[hereinafter cited as "1982 Policy Statement"]; *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978)[hereinafter cited as "1978 Policy Statement"].

^{16/}1978 Policy Statement, 68 F.C.C.2d at 980-81.

The Commission later reiterated this view in the *1982 Policy Statement*, where the use of tax certificates as a vehicle to encourage minority ownership in broadcasting was expanded.^{17/}

The year 1982 also saw the Commission extend its tax certificate policies to franchised cable systems, on the ground that cable systems perform identical functions for their subscribers as broadcast stations perform for their viewers. Specifically, the Commission stated that:

[C]able television system operators may exercise discretion in determining which broadcast and non-broadcast signals they will carry, as well as in selecting pay programming from alternate sources. Additionally, they may engage in program origination. . . . [c]able operators, like broadcasters, exercise discretion in their choice of programming^{18/}

The same logic dictates that the tax certificate program be expanded to include wireless cable system operators. Like cable operators, wireless cable system operators select the programming that they will distribute to their subscribers and can engage in local origination programming. Certainly, WCAI recognizes that the Commission's tax certificate program has been the source of recent political controversy. Nevertheless, if Congress permits the continued issuance of tax certificates by the Commission, WCAI strongly supports their use to promote greater participation by minorities and women as wireless cable system owners.

The Commission has also proposed in the *NPRM* expanding its current tax certificate policy to permit reinvestment of proceeds in any communications business and to increase the

^{17/}See *1982 Policy Statement*, 92 F.C.C.2d at 857-58.

^{18/}*Policy Statement on Minority Ownership of Cable Television Facilities*, 52 Rad.Reg. 1469 (P&F 1982)[hereinafter cited as "*Cable Policy Statement*"].

capital gains deferral period from two years to at least four years.^{19/} Clearly, adoption of these proposals would have two beneficial effects on wireless cable. First, it would enhance the ability of minorities and women to participate in the wireless cable industry by making more attractive both (i) start-up investment in wireless cable operators controlled by minorities or women, and (ii) the sale of existing systems to such wireless cable operators. Investors would have greater flexibility in the use of tax certificates, enhancing their value. Second, it would promote greater investment in wireless cable by clarifying that those who receive tax certificates in connection with broadcast or cable properties can utilize those certificates in connection with the reinvest of proceeds in the wireless cable industry.

Any use of tax certificates, however, should be subject to the anti-trafficking and anti-fraud safeguards outlined in WCAI's Comments in the *MDS Auction Proceeding*.^{20/} As the WCAI suggested in the *MDS Auction Proceeding*, in implementing a tax certificate program for MDS, the Commission should impose the same restrictions it has employed in crafting the IVDS, narrowband PCS and broadband PCS programs. Tax certificates should only be available to an investor in a minority- or women-owned or controlled business when the sale of that investor's interest does not reduce the minority or female ownership or control below 50.1%.^{21/} With regard to the investor tax certificate program, the entity in which the

^{19/}See *NPRM*, at ¶ 29.

^{20/} See WCAI MDS Auction Comments, at 57-58.

^{21/}See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2941, 2978 (1994)[hereinafter cited as "*Auction Third Report and Order*"]; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, FCC 94-99, PP Docket No. 93-253, at ¶ 51 (rel. May 10, 1994)[hereinafter cited as "*Auction Fourth* (continued...)]

investment is made should be required to satisfy the definition of a minority- or female-owned entity set forth in the *Second Report and Order* in PP Docket No. 93-523 at the time of the original investment as well as after the investor's shares are sold.^{22/} For aftermarket sales, tax certificates should be issued only to entities that meet the definition at the time of sale.^{23/} Finally, to deter sham transactions, the Commission should impose a one-year holding requirement on the transfer or assignment of assets obtained through the benefit of tax certificates.^{24/}

The Commission also proposes to implement an incubator program, not only for traditional television and radio broadcasting, but also for low power television, cable television and wireless cable.^{25/} Under the approach advocated in the *NPRM*, existing media companies would have the opportunity to offer minorities and women expertise and financial support in exchange for regulatory benefits.^{26/} While WCAI supports the Commission's objectives, WCAI

^{21/}(...continued)
Report and Order]; *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 5532, 5596 (1994)[hereinafter cited as "*Auction Fifth Report and Order*"].

^{22/}*See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2348 (1994).

^{23/}*See Auction Third Report and Order*, 9 FCC Rcd at 2979; *Auction Fourth Report and Order*, FCC 94-99, at ¶ 52; *Auction Fifth Report and Order*, 9 FCC Rcd at 5596.

^{24/}As with IVDS, narrowband PCS and broadband PCS, while the holding period should not apply to assignments or transfers to qualified minority- or female-owned businesses, assignees and transferee obtaining MDS licenses pursuant to such exception should be subject to the one-year holding requirement. *See id.*

^{25/}*See id.*, at ¶ 18.

^{26/}*Id.*, at ¶¶ 15-24.

believes that it will be difficult to craft a meaningful incubator program for the wireless cable industry.

As a general matter, wireless cable system operators have been quite generous in sharing their management expertise with newcomers to the industry on a voluntary basis. However, as a practical matter, most wireless cable system operators are simply in no position to offer meaningful financial support to entities controlled by minorities or women. While the recent entry into the wireless cable business by several telephone companies has grabbed the headlines, the reality is that most wireless cable systems in operation today either are unable to secure sufficient funding for their own needs, or are suffering from extremely high costs of the capital they can secure.^{27/} It is unrealistic for the Commission to expect the wireless cable industry, which itself has had difficulty attracting capital, to fund incubator programs.

Leaving aside the inability of most wireless cable system operators to participate in a meaningful incubator program, the *NPRM* is silent as to the regulatory benefits that would redound to wireless cable system operators that participate in an incubator program. Although the Commission has proposed to grant incubating broadcasters exceptions to national ownership limits, no similar limits apply in the wireless cable industry.^{28/} Thus, it remains to be seen

^{27/}See *Wireless Cable Investor*, at 3, 6 (April 30, 1995).

^{28/}The Commission has consistently refused to adopt proposals to impose ownership limits on wireless cable, other than its rules limiting the ability of franchised cable system operators to own or lease MDS and ITFS channels in the vicinity of their franchise areas. See 47 C.F.R. §§21.912, 74.931(h). Because these rules are essential to maintaining the ability of wireless cable to serve as meaningful competition to cable, no exceptions should be permitted for a franchised cable system operator that participates in an incubator program. See e.g. *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 6410, 6416-17 (1990); *Amendment of Parts 21, 43, 74, 78, and 94 of* (continued...)

whether the benefits to be offered wireless cable system operators that participate in an incubator program will be sufficient to lead to significant support for minority and women owned enterprises.

WHEREFORE, WCAI supports the Commission's proposals to encourage minority and women ownership of mass media, subject to the concerns expressed above.

Respectfully submitted,

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^{28/}(...continued)
the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 6 FCC
Rcd 6764, 6775-76 (1991).